Supreme Court, U.S.
FILED
031053 JAN 9 - 2004
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

MARK D. SHENKAN,

Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Bruce Bagin, Esq.
Counsel of Record for Petitioner
Wienand & Bagin
312 Boulevard of the Allies
Suite 600
Pittsburgh, PA 15222-1923
412.281.1110

Co-counsel Richard Shenkan, Esq.

QUESTIONS PRESENTED

Prior to this court's ruling in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 and 115 n.9 (2002), ("*Morgan*") there existed two principal theories of the continuing violation in an employment discrimination case. The first, the serial theory, was abrogated by this Court in *Morgan*. The second, variously known as the systemic theory or the pattern and practice theory, was specifically reserved by *Morgan* in footnote nine. The issues in this case involve the systemic theory of the continuing violation and the deference owed to the administrative rulings of the EEOC interpreting its own regulation.

I. **Whether Petitioner's complaints of violations of the Rehabilitation Act were timely initiated when the Respondent's failure or refusal to hire him for a casual position was the inevitable result of an ongoing systemic policy, pattern or practice of regarding any applicant with mental impairments as disabled, and therefore unsuitable for employment.**

II. **Whether the systemic or pattern and practice theory of continuing violation makes any complaint timely as long as the systemic policy, pattern and practice is operative.**

III. **Whether *Griggs* deference, *Chevron* deference, or any deference is due to the EEOC's determination interpreting its own procedural and interpretive regulations.**

PARTIES TO THE PROCEEDINGS

Petitioner is Mark D. Shenkan.

Respondent is John E. Potter, Postmaster General of the United States.

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i- ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES ..... iv - vii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

RELEVANT PROVISIONS INVOLVED ..... 2 - 3

STATEMENT OF THE CASE 4

(i) **Nature of the Case** 4

(ii) **Proceedings at the United States Postal Service** . 4

(iii) **Proceedings at the United States Equal Opportunity Commission** ..... 4 - 7

(iv) **Proceedings at the District Court** 7

(v) **Statement of Facts** ..... 7 - 14

(vi) **Statement of Court of Appeals and Supreme Court Jurisdiction** 14

REASONS FOR GRANTING THE WRIT 16

I. **The decision of the Third Circuit is in conflict with the decisional law of the United States Courts of Appeals for the 1st, 5th, 6th, 7th, 9th, 10th and D.C. Circuits as well as the policy and precedential decisions of the United States Equal Employment Opportunity**

Commission. . . . . . 16 - 23

II. The decision of the Third Circuit failed to grant *Chevron* deference to the decision of the EEOC, interpreting its own regulations, policy and precedent in finding that the contact by Mark Shenkan with the EEO Counselor was timely. . . . . . 23 - 27

CONCLUSION 27

APPENDIX

A-CIRCUIT COURT OPINION (6/13/02) 1a

B-ORDER DENYING REHEARING (8/14/03) 13a

C-DISTRICT COURT OPINION / ORDER (8/15/02). 15a

TABLE OF AUTHORITIES

CASES

Alexander v. Local 496, Laborers' Intern. Union of North America, 177 F.3d 394 (6th Cir 1999) 18

Allen v. United States Steel Corp., 665 F.2d 689 (5th Cir.1982).17

Auer v. Robbins, 519 U.S. 452 (1997) 24, 25, 26, 27

Bartmess v. Drewrys USA Inc., 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971) 18, 20

Belt v. Johnson Motor Lines, Inc., 458 F.2d 443 (5th Cir. 1972) 16, 20

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, (1945) . . 24

Carpinteria Valley Farms, Ltd. v. County of Santa Barbara, 344 F.3d 822 (9th Cir. 2003) 22

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 24, 26

Cowell v. Palmer Twp., 263 F.3d 286 (3d Cir. 2001) 13

Crowley v. L.L. Bean, Inc., 303 F.3d 387,405 (1st Cir.2002) .. 22

Dixon v. Anderson, 928 F.2d 212, 216 (6th Cir. 1991) 18

Dobbs v. City of Atlanta 606 F.2d 557 (5th Cir.1979) 17

Domingo v. New England Fish Co. 727 F.2d 1429, 1443 (9th Cir. 1984), *modified* 742 F.2d 520 (1984) 19

E.E.O.C. v. Joe's Stone Crabs, Inc., 296 F.3d 1265 (11th Cir. 2002), *rehearing en banc denied*, 55 Fed Appx. 904 (11th Cir 2002), *cert. denied*, ___U.S.___ U.S.L.W. 3789, (2003) 21

EEOC v. Western Publishing Co., 502 F.2d 599 (8th Cir. 1974).20

Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241 (5th Cir.1981) 17

Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472 (9th Cir. 1989) 19

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) . 22

Jensen v. Frank, 912 F.2d 517 (1st Cir. 1990) 13, 16

Johnson v. General Electric Co., 840 F.2d 132 (1st Cir. 1988) 16

Lyons v. England, 307 F.3d 1092 (9th Cir. 2002) 23

Mack v. Great Atlantic & Pacific Tea Co., 871 F.2d 179

(1st Cir. 1989) 15

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 20, 21

National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002) 17

Perez v. Laredo Junior College, 706 F.2d 731 (5th Cir 1983) .. 20

Reed v. Lockheed Aircraft Co., 613 F.2d 757, 760 (9th Cir. 1980) 20

Rich v. Martin Marietta, 522 F.2d 333 (10th Cir. 1975) ... 16, 20

Roberts v. North American Rockwell Corp., 650 F.2d 823 (6th Cir. 1991) 18

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) 24

Rush v. Scott Specialty Gases, 113 F.3d 476, 482-84 (3d Cir. 1997) 13

Sabree v. United Brotherhood of Carpenters and Local Joiners, 921 F.2d 396 (1st Cir. 1990) 11, 26

Shenkan v. Potter, 71 Fed. Appx. 893, 895 (3d Cir. 2003) 13

Velazquez v. Chardon, 736 F.2d 831 (1st Cir. 1984) 16

West v. Philadelphia Elec. Co., 45 F.3d 744 (3d Cir. 1995) ... 14

Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir.), *cert. denied*, 459 U.S. 971(1982) 19

ADMINISTRATIVE DECISIONS

Gills v. United States Postal Service, EEOC Request No. 05970971 (August 18, 1997) 26

Shenkan v Henderson, 1999 EEOPUB LEXIS 5506 (September 14, 1999) 6

Shenkan v. Henderson, 2000 EEOPUB LEXIS 3134 (May 11, 2000) 6

STATUTES

28 U.S.C. §§ 1331, 1339, & 1343 12

42 U.S.C. § 2000e-5(g) 20

42 U.S.C. § 2000e-5(f) 12

42 U.S.C. §§ 2000e-16 ..... 12, 25

Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ... 9

Rehabilitation Act of 1973, 29 U.S.C §§ 701 et seq. 9, 11

Section 503(b) of the Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344, 4424 (October 29, 1992) . 9

REGULATIONS

29 C.F.R. § 1614.105(a)(1) 2, 4

29 C.F.R. § 1614.105(a)(2) 2, 4

MISCELLANEOUS AUTHORITIES

1978 Reorg. Plan No. 1 of Feb. 23, 1978, 43 Fed. Reg. 19807, Section 3 24

Postal Service Publication EL-806 ..... 8, 21

B. Schlei & P. Grossman, Employment Discrimination Law (2d ed. Supp. 1987) 16

PETITION FOR WRIT OF CERTIORARI

Mark Shenkan, the Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Third Circuit entered in this case on June 13, 2003.

OPINIONS BELOW

The opinion of the district court granting a motion for summary judgment against Petitioner (App. C hereto) is unreported. The opinion of the Third Circuit Court of Appeals, (App. A hereto) which is sought hereby to be reviewed, is reported at 71 Fed. Appx. 893 (3d Cir. 2003). The order of the Third Circuit denying rehearing and denying rehearing *en banc* (App. B hereto) is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (Appendix A) was entered on June 13, 2003. A timely petition for rehearing and rehearing *en banc* was denied on August 14, 2003 (Appendix B). The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10 (a) and 10 (c) in

that the decision of the Third Circuit is in conflict with the decisions of other United States Courts of Appeals on the same important matter and has also decided an important question of federal law that has not been, but should be, settled by this Court.

RELEVANT PROVISIONS INVOLVED

TITLE 29, SUBTITLE B, CHAPTER XIV, PART 1614, SUBPART A, SECTION 105, (a)(1) and (2), 29 C.F.R. § 1614.105(a)(1) and (2). Provides as follows:

> § 1614.105 Pre-complaint processing.
>
> (a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.
>
> (1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.
>
> (2) The agency or the Commission shall extend the 45--day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel

action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

STATEMENT OF THE CASE

(i) Nature of the Case

This is a petition for review of the decisions of the United States District Court for the Western District of Pennsylvania granting Respondent's Motion for Summary Judgment, on grounds that the Third Circuit has not adopted the systemic or pattern and practice theory of the continuing violation, and therefore Petitioner failed to initiate the Federal sector Equal Opportunity Procedure (29 C.F.R. § 1614.105(a)(1) and (2)), within 45 days of the discriminatory acts, and the Third Circuit Court of Appeals' affirmance of that erroneous decision.

(ii) Proceedings at the United States Postal Service

Petitioner has been diagnosed with a mental impairment, bi-polar disorder, which is controlled by medication and by counseling therapy. Petitioner was denied employment for a casual position on November 28, 1995, and again in November, 1997. Shenkan requested reconsideration and reactivated his application on February 9, 1998.

When the Postal Service failed or refused to respond to this request within a reasonable time, Shenkan initiated the federal sector EEO complaint procedure on March 17, 1998. Critically, after Shenkan filed his EEO complaint, the Postal Service management affirmed (as verified by the EEO investigator) that Shenkan's November, 1997 application was still being considered. Thereafter, Shenkan timely filed a formal EEO complaint when the informal period lapsed without his receiving any relief.

The Postal Service dismissed two of the four allegations of Shenkan's complaint as untimely by a "final agency decision" (FAD 1) on June 4, 1998, and dismissed the third allegation by remaining silent. It issued a "final agency decision" (FAD 2) on January 20, 1999, of no discrimination on the remaining allegation that it had retained for investigation.

(iii) **Proceedings at the United States Equal Employment Opportunity Commission**.

Shenkan filed a timely appeal of the dismissal of his complaint of discrimination in FAD 1 and in FAD 2 with the

United States Equal Employment Opportunity Commission (EEOC). These were consolidated by the EEOC in making its September 14, 1999, decision which affirmed the dismissal of the two allegations in FAD 1 and affirmed the decision of no discrimination in FAD 2.

The EEOC remanded the allegation that the Postal Service violated the Rehabilitation Act when it requested information concerning his impairment prior to making a conditional offer of employment, which the Postal Service had silently dismissed. *Shenkan v Henderson*, 1999 EEOPUB LEXIS 5506 (September 14, 1999).

On October 13, 1999, Mark D. Shenkan (complainant) timely initiated a request to the EEOC to reconsider the decision in *Mark D. Shenkan v. Henderson*, EEOC Appeal Nos. 01985106 & 01992808 (September 14, 1999). *Shenkan v. Henderson*, 2000 EEOPUB LEXIS 3134 (May 11, 2000). The EEOC granted reconsideration and reversed its decision in Shenkan in its entirety because Shenkan had alleged a systemic violation, not a serial violation, and its earlier decision had mistakenly applied the serial

violation theory of the continuing violation. It remanded the complaint to the Postal Service for investigation.

(iv) Proceedings at the District Court

On February 13, 2001, Shenkan filed the complaint which gives rise to this request, in the United States District Court for the Western District of Pennsylvania. The court granted summary judgment to the Postal Service on August 15, 2002 and a timely Notice of Appeal was filed on September 9, 2002.

(v) Statement of Facts

On March 17, 1998, Petitioner initiated the informal process with an EEO Counselor when he was not hired in November 1995, in November 1997, after the Postal Service did not respond to a request for reconsideration in February, 1998. Later, in May of 1998, Shenkan filed yet another application for employment at the invitation of the Postal Service. During the informal process the EEO investigator conducted an initial inquiry and learned that Shenkan's 1997 application was still current and under consideration. Postal Service management verified by affidavit this critical fact.

In connection with the Postal Service's uniform

application process, the Postal Service directed Shenkan to complete a standardized form which elicited information of Petitioner's physical and mental impairments. The Postal Service employed the use of this form prior to extending an offer of employment. Shenkan learned that he was not hired because of his mental impairment, which the Postal Service regarded as a disability, without any regard to whether Shenkan could perform the essential functions of a position with a reasonable accommodation.

In 1971, the Postal Service received authority from the then Civil Service Commission to conduct its own personnel practices. The Postal Service established medical standards contained in Postal Service Publication EL-806, that were specifically designed to reject for employment any individual with a physical or mental impairment. At the time that this system of hiring was established, discrimination because of a disability was not unlawful; however, the medical standards were never changed after they were written, and the employees who applied these standards were trained to apply them strictly even

after the passage of the Rehabilitation Act of 1973, 29 U.S.C §§ 701 et seq. (2003), the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. (2003), and Section 503(b) of the Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344, 4424 (October 29, 1992)

When Petitioner first applied for a casual position with the Postal Service in 1995, the contract medical doctor certified him as qualified and able to perform the duties of the casual position. The Postal Service medical officer summarily reversed the contract doctor's decision to pursuant to the Postal Service's blanket, systemic, pattern and practice of relying on Postal Service Publication EL-806 to reject for employment any applicant with mental impairments regardless of the degree to which the impairment was controlled.

The Postal Service dismissed Shenkan's complaints as untimely. Shenkan timely appealed to the EEOC on the grounds that his being rejected for employment flowed from an acknowledged pattern and practice of systemic discrimination, and under the systemic pattern and practice of discrimination

theory of continuing violation and, accordingly, that he filed a timely EEO complaint. From the very beginning, Shenkan has maintained that his being denied employment by the Postal Service was the direct and inevitable result of the Postal Service's systemic pattern and practice of discrimination because of its inflexible application of its outmoded medical standards.

At the time of the appeal to the EEOC, there existed two major theories of the continuing violation: the serial theory which was abrogated by this court in *National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 114 (2002); and the systemic pattern and practice theory which was specifically reserved for decision in *Morgan* at 115, n. 9. In this case Petitioner complained about discrimination flowing from the systemic pattern and practice of using the unlawful medical standards to reject otherwise qualified applicants for employment.

The EEOC mistakenly applied the serial theory of continuing violations and ignored its precedent with respect to the systemic, pattern and practice theory of the continuing violation and initially affirmed the dismissals by the Postal Service. However, because the Postal Service had de facto dismissed Shenkan's allegations that he was required to identify his

disability on a Postal form that referred to impairments as disabilities prior to receiving any job offer (a per se violation of the Rehabilitation Act), the EEOC remanded this issue for investigation.

Shenkan requested reconsideration because the EEOC decision ignored its precedent of the systemic theory - that where the discrimination was systemic, a claim is always timely so long as the pattern and practice continues into the limitations period and the discriminatory system remains unchanged. Unlike in *Morgan*, this theory can involve multiple discrete acts and is applied to all applicants for employment with the Postal Service. The EEOC reversed its prior decision and remanded all of Shenkan's complaints for investigation. The EEOC's rationale for the decision, was as follows:

> Commission precedent holds that when a claim involves a systemic violation, there need not be an identifiable discrete act of discrimination transpiring within the limitations period. See *Gills v. United States Postal Service,* EEOC Request No. 05970971 (August 18, 1997), citing *Sabree v. United Brotherhood of Carpenters and Local Joiners*, 921 F.2d 396, 400 (1st Cir. 1990). According to the *Sabree* court, "[a] systemic violation has its roots in a discriminatory policy or practice; so long as the policy or practice itself continues into the limitations period, a challenger may be deemed to have filed a timely complaint." *Sabree*, 921 F.2d at 400, fn. 7.

Further efforts to resolve Shenkan's complaint administratively failed. Subsequently, Shenkan timely filed a complaint in the U.S. District Court for the Western District of Pennsylvania. Jurisdiction and venue were proper under 42 U.S.C. § 2000e-16 and § 5(f)(3) and 28 U.S.C. §§ 1331, 1339, & 1343.

The complaint contained factual allegations that the Postal Service maiantained a systemic policy of regarding as disabled any applicant or employee with an impairment and then summarily rejecting the applicant without any regard to whether the applicant can perform the essential functions of the position with or without a reasonable accommodation.

The complaint referenced two prior, separate cases which addressed this systemic discriminatory policy at issue. In one of those cases, an EEOC Administrative Judge chastised the Postal Service for failing to offer reasonable accommodations to its casual employees (Shenkan applied for a casual position). The Postal Service moved to strike this factual information as impertinent and the Motion was granted.

Next, the Postal Service moved to dismiss the complaint, or in the alternative for summary judgment. Thereafter, the court

granted very limited discovery to answer the motion. The court ignored the systemic pattern and practice theory of the continuing violation and instead applied the serial theory of the continuing violation cases from the Third Circuit which were abrogated by this court in *Morgan,* and granted summary judgment.

On appeal, the Third Circuit mistakenly concluded that Shenkan is really complaining of two failures to hire,[1] which are "isolated, intermittent acts of discrimination, that are "not susceptible to a continuing violation analysis" *Shenkan v. Potter*, 71 Fed. Appx. 893, 895 (3d Cir. 2003), and took issue with the holding in *Jensen v. Frank*, 912 F.2d 517, 523 (1st Cir. 1990) (where such practices arise out of a systemic pattern or practice they are timely so long as the pattern or practice continue) stating

---

1. Here, the record shows that Shenkan's 1997 application was still current and being considered by the Postal Service even after Shenkan filed his EEO complaint and that the Postal Service continued to seek applicants. Moreover in May of 1998, the Postal Service telephoned Shenkan and requested that Shenkan complete yet another application. Shenkan did so. To this date Shenkan has not been hired by the Postal Service, despite his claims that the written medical standards memorialize a pattern of practice of discrimination because of disability in violation of the Rehabilitation Act.

that "[s]uch case law, however, is clearly inconsistent with our binding precedent." See, e.g., *Cowell v. Palmer Twp.*, 263 F.3d 286, 292-95 (3d Cir. 2001); *Rush v. Scott Specialty Gases*, 113 F.3d 476, 482-84 (3d Cir. 1997; *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 754-55 (3d Cir. 1995). The Third Circuit subsequently affirmed the decision of the District Court in a non-published, non-precedential opinion and denied the petition for rehearing and for rehearing *en banc.*, *Shenkan* at 895 (3d. Cir 2003).

(vi) Statement of Court of Appeals and Supreme Court Jurisdiction

Jurisdiction was proper to the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 1291.

This court has jurisdiction pursuant to 28 U.S.C. § 1254 and (1) Rules10 (a) and (c) the Rules of the Supreme Court of the United States as set forth above. That is, the petition for certiorari will present a conflict among the circuits of an important question of law and the Third Circuit Court of Appeals has decided an important question of federal law that will affect the employment rights of 2,726,755 federal and postal workers as well as all workers protected by Title VII of the Civil Rights Act of 1964, as amended, that should be decided by this Court. That

question is whether the systemic, pattern or practice theory of the continuing violation requires an act of discrimination to have occurred within the time permitted by statute or regulation in the case of federal-postal workers, or is a charge or complaint always timely as long as the systemic, pattern and practice is operative during the limitations period. The decision of the Third Circuit, that it does not, conflicts with decisional law of the U.S. Courts of Appeals for the 1st, 5th 6th, 7th, 9th, 10th and D.C. Circuits, as well as the decisional law and policy of the EEOC.

It is an important question reserved by this court in *Morgan* at 115, n. 9, which affects hundreds of thousands of workers, which addresses repeated discrete acts of discrimination arising from an employment system, the origin of which is in discrimination, thereby creating a pattern or practice of discrimination. A case of this magnitude deserves review by the Supreme Court.

REASONS FOR GRANTING THE WRIT

I. **The decision of the Third Circuit is in conflict with the decisional law of the United States Courts of Appeals for the 1st, 5th, 6th, 7th, 9th, 10th and D.C. Circuits as well as the policy and precedential decisions of the United States Equal Employment Opportunity Commission.**

A. First Circuit.

In *Mack v. Great Atlantic & Pacific Tea Co.*, 871 F.2d 179, 183 (1ST Cir. 1989), the court addressed the systemic or pattern or practice theory of the continuing violation as follows:

> We have recognized that if a Title VII violation occurs in the wake of some continuing policy, itself illegal, then the law does not bar a suit aimed at the employer's dogged insistence upon that policy within the prescriptive period. See *Johnson v. General Electric Co.*, 840 F.2d 132, 136-37 & n. 5 (1st Cir. 1988); *Velazquez v. Chardon*, 736 F.2d 831, 833 (1st Cir. 1984); see also *Rich v. Martin Marietta*, 522 F.2d 333, 348 (10th Cir. 1975) (where entire promotional system challenged as operating to hold plaintiffs in lower echelons continually, the limitations period "looms inconsequential"); B. Schlei & P. Grossman, Employment Discrimination Law, 235 (2d ed. Supp. 1987) at 235-36. In other words, if both discrimination and injury are ongoing, the limitations clock does not begin to tick until the invidious conduct ends.

and in *Jensen v. Frank*, 912 F.2d 517, 523 (1st Cir. 1990); where the court described the difference between a serial violation and a systemic violation as follows:

> By contrast with a serial violation, a systemic violation need not involve an identifiable, discrete act of discrimination transpiring within the limitation period. A systemic violation has its roots in a discriminatory policy or practice; so long as the policy or practice itself continues into the limitation period, a challenger may be deemed to have filed a timely complaint. Citations omitted.

B. Fifth Circuit

In *Belt v. Johnson Motor Lines, Inc.*, 458 F.2d 443 (5th Cir. 1972) ("no reason to lock the courthouse door to his claim solely because he has alleged a contemporary course of conduct as an act of discrimination.") the Fifth Circuit addressed the problem of a systemic pattern or practice of denying more lucrative over-the-road driving positions to its African-American employees who were employed exclusively as city drivers where the appellants had not filed charges with the EEOC within 90 days of the alleged violations. The court reversed the district court and remanded the complaint for a determination as to whether the employer engaged in a continuing pattern and practice of not employing African-American city drivers in over-the road driving positions which continued into the limitations period.

In *Perez v. Laredo Junior College*, 706 F.2d 731,733 (5th

Cir 1983), the court stated:

> Similarly, if the statutory violation occurs as a result of a continuing policy, itself illegal, then the statute does not foreclose an action aimed at the company's enforcement of the policy within the limitations period. n9 Thus in *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir.1981), dealing with whether a charge of discrimination in violation of Title VII was filed within the 180-day statutory period, we distinguished between "a discrete act of discrimination [that occurred] more than 180 days prior to the filing of [the] charge" and the act of "continuously maintaining an illegal employment practice." See also *Allen v. United States Steel Corp.*, 665 F.2d 689 (5th Cir.1982); *Dobbs v. City of Atlanta* 606 F.2d 557 (5th Cir.1979).

C. Sixth Circuit

In *Alexander v. Local 496, Laborers' Intern. Union of North America,* 177 F.3d 394, 408 (6th Cir 1999), the court acknowledged that a second category of continuing violations arises "where there has occurred a longstanding and demonstrable policy of discrimination . . . . Unrelated incidents of discrimination will not suffice to invoke this exception; rather there must be a continuing over-arching policy of discrimination." *Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991). See also: *Roberts v. North American Rockwell Corp.*, 650 F.2d 823 (6th Cir. 1991).

D. Seventh Circuit

Bartmess v. Drewrys USA Inc., 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971) (maintenance of an allegedly discriminatory retirement plan is a continuous discriminatory practice). In *Bartmess*, the employer negotiated a contract provision that retired female employees at age 62, and male employees at age 65. The appellant filed a charge 4 months before she was involuntarily retired pursuant to the pattern or practice of discrimination. The employer challenged the filing as premature. The court held that the charge was timely so long as the policy or practice continued into the limitations period. In other words the policy amounted to a continuing violation of Title VII, so that her filing was not premature. *Id.* at 1188.

In this case, Shenkan initiated the EEO Process in which he complained of a continuing written policy or practice, to which the Postal Service adhered, that denied him employment in the past and which continued to deny him employment thereafter.

E. Ninth Circuit

In *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480 (9th Cir. 1989), the court held, as follows:

> The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements.
>
> [A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions. *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir.) (citation omitted), *cert. denied*, 459 U.S. 971(1982); see also *Domingo v. New England Fish Co.* 727 F.2d 1429, 1443 (9th Cir. 1984), *modified* 742 F.2d 520 (1984); *Reed v. Lockheed Aircraft Co.*, 613 F.2d 757, 760 (9th Cir. 1980).

F. Tenth Circuit

In *Rich v. Martin Marietta*, 522 F.2d 333, 348 n. 15 (10th Cir. 1975), the Tenth Circuit held that:

> This conclusion [Injunctive relief could be given against the application of the alleged discriminatory ranking system and, if proven, damages could be awarded for the past effects of that system within the two year time limitations of 42 U.S.C. §§ 2000e-5(g).] is in accord with the general rule that has evolved in the Circuits that a plaintiff alleging a continuing violation of Title VII may file charges with the EEOC at any time during which the alleged continuing violation has taken place. See *EEOC v. Western Publishing Co.*, 502 F.2d 599 (8th Cir. 1974);

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973); *Belt v. Johnson Motor Lines, Inc.*, 458 F.2d 443 (5th Cir. 1972); *Bartmess v. Drewrys U.S.A.*, Inc., 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939, (1971).

In *Shenkan*, Appellant challenged the discriminatory medical standards that barred his employment; that were still ongoing at the time that he filed his informal complaint with the EEO Counselor. Since Shenkan filed his administrative complaint, the Postal Service has continued to reject his application despite annual hiring. Either the wooden application of the medical standards contained in Postal Service publication continues to the present time or Shenkan is a victim of retaliation for complaining of discrimination.

G. D.C. Circuit

In *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 987 (D.C. Cir. 1973), the court held that the layoff of black workers and prolonged union grievance proceedings "amounted merely to single episodes in an alleged conspiracy to deny applicants over-the-road driver jobs because of their race continuing at least up to and including the date the EEOC complaint was filed." It is clear that the pattern or practice systemic medical standards for hiring continued in effect well

after the complaint of Mark Shenkan. In fact, Dr. David Reid, the USPS Medical Officer, testified that the medical standards are found in Postal Service publication EL-806 and were unchanged as of the date of the deposition, May 24, 2002, which is well after Mr. Shenkan filed his complaint.

DECISIONS SINCE *MORGAN*

A. 11 th Circuit

In *E.E.O.C. v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1275-1276, (11th Cir. 2002), *rehearing en banc denied*, 55 Fed Appx. 904 (11th Cir 2002), *cert. denied*, ___U.S.___ U.S.L.W. 3789, (2003), the Eleventh Circuit, relying on this Court's ruling in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977), ("When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application."), held that no applicant during the pendency of the discriminatory pattern or practice was required to file a timely charge of discrimination if the policy or practice continued into the limitations period.

B. First Circuit

In *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387,405 (1st Cir.2002), the First Circuit recognized the systemic theory of the continuing violation, but found that the appellant was a victim of hostile working environment as defined in *Morgan,* and not an ongoing pattern of practice of discrimination under the continuing violations theory.

C. Ninth Circuit

In *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 829 n. 3 (9th Cir. 2003), the Ninth Circuit explained the history of the continuing violation theory before and after *Morgan*, as follows:

> In *Morgan*, the Court recognized that prior Ninth Circuit precedent allowed plaintiffs two methods by which to avail themselves of the continuing violation doctrine. *Morgan*, 536 U.S. at 107. Although the Court invalidated the "related acts" method, it declined to address the "systematic pattern-or-practice" method. *Id.* at 115 n. 9. Moreover, the Court distinguished "hostile environment" claims and recognized that proof of such claims may include reliance on otherwise time-barred incidents. I*d.* at 115 ("The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.") On remand, the district court may consider whether to allow Nesbitt to amend his complaint

> to allege facts in support of these alternative theories suggested by Morgan. See *Lyons v. England*, 307 F.3d 1092, 1107 n. 8 (9th Cir. 2002)....

It is clear that the systemic or pattern or practice theory of the continuing violation alleged by Petitioner throughout his entire complaint from the administrative process through to the present time was rejected by the Third Circuit, and is in conflict with the decisional law of the circuits, as heretofore identified.

II. The decision of the Third Circuit failed to grant *Chevron* deference to the decision of the EEOC, interpreting its own regulations, policy and precedent in finding that the contact by Mark Shenkan with the EEO Counselor was timely.

In *Auer v. Robbins*, 519 U.S. 452, 461, n.11 (1997), this Court held that:

> Because the salary basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless " `plainly erroneous or inconsistent with the regulation.' " *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)....

In *Auer*, the Secretary of Labor, in its brief, explained its interpretation of a test contained in its regulations. This Court, citing to precedent, stated that:

> Because Congress has not "directly spoken to the precise question at issue," we must sustain the Secretary's approach so long as it is "based on a permissible construction of the statute."

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984).

In this case, the EEOC's authority over the federal EEO process is authorized by Section 3 of 1978 Reorg. Plan No. 1 of Feb. 23, 1978, 43 Fed. Reg. 19807, which provided:

> Transfer of Equal Opportunity in Federal Employment Enforcement Functions
>
> (a) All equal opportunity in Federal employment enforcement and related functions vested in the Civil Service Commission pursuant to Section 717(b) and (c) of the Civil Rights Act of 1964, as amended, (42 U.S.C. 2000e-16(b) and (c)), are hereby transferred to the Equal Employment Opportunity Commission.
>
> (b) The Equal Employment Opportunity Commission may delegate to the Civil Service Commission or its successor the function of making a preliminary determination on the issue of discrimination whenever, as a part of a complaint or appeal before the Civil Service Commission on other grounds, a Federal employee alleges a violation of Section 717 of the Civil Rights Act of 1964, as amended, (42 U.S.C. 2000e-16) provided that the Equal Employment Opportunity Commission retains the function of making the final determination concerning such issue of discrimination.

One of the functions of the Civil Service Commission under Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16 (2003) was as follows:

> "...the Civil Service Commission shall ... issue

> such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section."

Thus, Congress gave an express grant of authority to the EEOC to issue rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under Section 717 of Title VII of the Civil Rights Act of 1964. Under *Auer*, the EEOC's interpretations of its own regulations, where, as here, there is an express grant of authority from Congress, are entitled to *Chevron* deference. *Auer* at 461.

In this case the EEOC interpreted its own regulations, specifically, 29 C.F.R. § 1614.105(a)(2) which states:

> (2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.(emphasis added)

The EEOC concluded that Mark Shenkan had raised a timely systemic complaint of discrimination and remanded the case to the Postal Service for investigation. In deciding that the

Shenkan complaint was timely, the Commission applied its precedent from a prior administrative case, *Gills v. United States Postal Service*, EEOC Request No. 05970971 (August 18, 1997), and the holding of the First Circuit in *Sabree v. United Bhd. of Carpenters and Joiners Local No. 33*, 921 F.2d 396, 400-02 n. 7 (1st Cir. 1990). The Third Circuit erroneously failed to grant *Chevron* deference to the Commission's interpretation of its own regulations and instead stated that it had de novo review and the EEOC decision was of no consequence. See: *Shenkan v. Potter*, 71 Fed. Appx. 893, 895 n.1 (3d Cir. 2003). This holding is in conflict with this Court's holding in *Auer* and should be reversed.

CONCLUSION

The petition of writ of certiorari should be granted.

Respectfully Submitted,

Bruce Bagin, Esq.
Counsel of Record for Petitioner
Wienand & Bagin
312 Boulevard of the Allies
Suite 600
Pittsburgh, PA 15222-1923
412.281.1110

Co-counsel Richard Shenkan, Esq.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3508

MARK D. SHENKAN
v.
JOHN E. POTTER, POSTMASTER GENERAL,

Mark Shenkan, Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil no. 01-cv-00299)
District Judge: Honorable Donald E. Ziegler

Before: RENDELL, SMITH and ALDISERT, Circuit Judges

Filed: June 13, 2003
Argued May 13, 2003

Bruce Bagin, Esq., Wienand & Bagin [Argued]
312 Boulevard of the Allies, Suite 600
Pittsburgh, PA 15222
Counsel for Appellant

Bonnie R.Schlueter, Esq.
Christine A. Sanner, Esq. [Argued]
Office of U.S. Attorney
633 U.S. Post Office & Courthouse
Pittsburgh, PA 15219
Counsel for Appellee

OPINION OF THE COURT

RENDELL, Circuit Judge.

Mark Shenkan appeals from an order entered in the District Court on August 16, 2002 terminating his disability discrimination claims against the United States Postal Service for failure to timely exhaust administrative remedies. We will affirm.

In November of 1995, and again in November 1997, Mark Shenkan, who suffers from bipolar disorder, applied for "casual" temporary positions with the United States Postal Service. On both occasions, the Postal Service ultimately failed to hire him. On March 17, 1998 , Shenkan, believing he had been discriminated against, contacted the Postal Service's Equal Employment Opportunity ("EEO") counselor for mandatory counseling. After counseling failed to resolve the issue, Shenkan filed a formal administrative

complaint, which was dismissed by the Postal Service because Shenkan had failed to "initiate contact with (the) Counselor within 45 days of the matter alleged to be discriminatory," as required by 29 C.F.R & 1614.105. That decision was initially upheld on appeal to the Equal Employment Opportunity Commission ("EEOC"), but was later reversed on reconsideration, with the EEOC holding that Shenkan's claims were not barred for failure to timely exhaust because they fell within the "continuing violations doctrine" exception. On remand, the Postal Service found Shenkan's disability discrimination claims to be meritless.

Shenkan filed the present suit in February of 2001, alleging that the Postal Service discriminated against him by failing to hire him in 1995 and 1997 on the basis of his disability, and, more broadly, that the Postal Service had a pattern or practice of discriminating against the disabled with regard to temporary employment positions. Soon after

the suit was filed, the Postal Service moved to dismiss or, in the alternative, for summary judgment, again maintaining that Shenkan's claims were time-barred because he had failed to meet with the EEO counselor within 45 days. After a limited period of discovery, the District Court agreed that Shenkan had failed to comply with the requisite time limits, and granted the Postal Service's motion. This timely appeal followed.

The District Court has jurisdiction under 28 U.S.C. & 1331, and we have jurisdiction pursuant to 28 U.S.C. & 1291. Shenkan first argues that the District Court erred in concluding that he could not reap the benefit of the continuing violations doctrine,[1] an "equitable exception to

---

1. Shenkan alternatively argues that we should accord deference to the EEOC's determination that his claims were timely. Our case law is clear, however, that our review here is de novo. See e.g. Ettinger v. Johnson, 518 F.2d 648, 652 (3d Cir. 1975) (remanding for a de novo hearing to determine whether the plaintiff timely exhausted her administrative

timely filing requirement" that applies when a defendant's conduct is part of a continuing practice." Cowell v. Palmer Twp., 263 F.3d 286, 292 (3rd Cir. 2001)(quotations omitted); see also, e.g., West v. Phila. Elec. Co., 45 F.3d 744, 754-55 (3rd Cir. 1995). Under the continuing violations doctrine, "an action is timely so long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time-barred." Cowell, 263 F.3d at 292 (quoting Brenner v. Local 514, United Bhd. Of Carpenters and Joiners of Am., 927 F.2d 1283, 1295 (3d Cir. 1991)). In order to establish a continuing violation, the plaintiff must "demonstrate that at least one act occurred within the filing period," and that the employer's actions were "more than the occurrences of isolated or sporadic acts of intentional discrimination." West, 45 F.3d at 754-55

---

remedies); Kocian v. Getty Refining & Mktg. Co., 707 F.2d 748, 754 n.9 (3d Cir. 1983) ("(T)he EEOC's belief as to the timeliness of a charge is not determinative."); See also e.g., Teemac v. Henderson, 298 F.3d 452 (5h Cir. 2002).

(quotations omitted).

The present suit essentially alleges that the Postal Service had a continuing policy of discriminating against the disabled with respect to temporary employment positions.[2] Shenkan contends that at least two acts that were part of the policy occurred within 45 days of his contacting the counselor, namely (1) his February 1998 letter requesting "reconsideration" for employment, which went unanswered by the Postal Service, and (2) the Postal Service's confirmation in May of 1998 that his employment file remained active, and Shenkan's subsequent update of his application materials. But, neither of the supposed acts can be plausibly said to evidence any alleged discriminatory policy, as is explicitly required under the continuing violations doctrine. See e.g., Cowell, 263 F.3d at 292.

---

2. Shenkan also argues that his claims were timely because it would have been futile for him to apply during the limitations period given the Postal Service's alleged policy of discrimination. However, Shenkan did not allege in his complaint that he was in fact dissuaded from applying, nor is there evidence in the record to support that contention.

Further with the District Court conclusion, that Shenkan is really complaining of two failures to hire, which are "isolated, intermittent acts of discrimination." West, 45 F.3d at 755, that are "not susceptible to a continuing violation analysis." Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 483-84 (3d Cir. 1997). Three factors distinguish continuing violations from isolated occurrences - the subject matter, frequency, and, most importantly, degree of permanence of underlying acts. See Cowell, 263 F.3d at 292; Rush, 113 F.3d at 482. None point in Shenkan's favor. See e.g. Rush, 113 F.3d at 483-84 (holding that the plaintiff's "failure to promote and train claim addresse[d] discrete instances of alleged discrimination that [we]re not susceptible to a continuing violation analysis"). The Supreme Court recently emphasized this point in Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002), when it stated: "Discrete acts such as...refusal to hire are easy to identify. Each incident of discrimination...constitutes a separate actionable "unlawful practice." And, our warning

in Cowell applies equally here: "[T]he continuing violations doctrine should not provide a means for relieving plaintiff's from their duty to exercise reasonable diligence in persuading their claims." Cowell, 263 F.3d at 295. [3]

Throughout, Shenkan has concentrated on his continuing violation claim, but he has also maintained that his claims were not in time-barred because the Postal Service never notified him of the applicable time limits, citing a regulatory exception to the limitations period that provides: "The agency or the Commission shell extend the 45-day time limit...when the individual shows that he or she was not notified of the time limits and was not otherwise aware of

---

3. Shenkan contends that our continuing violations case law was "abrogated" by the Supreme Court's ruling in Morgan, but nothing in Morgan supports that remarkable assertion. Shenkan also cites cases from some of our sister Courts of Appeals for the proposition that one who is asserting a "systematic" continuing violation need not prove, for instance, that a discrete act evidencing the policy took place during the relevant limitations period. See, e.g. Jensen v. Frank, 912 F.2d 517, 523 (1st Cir. 1990).

them" 29 C.F.R & 1614.105(a)(2).[4] Under the cited regulation, if Shenkan could prove that he was never notified and that he was not otherwise aware of the time limits, his claims would not in fact be barred for his failure to contact the counselor within the proscribed 45 days.

Although there appears to be disputed record evidence as to whether the Postal Service did provide adequate notice, Shenkan has never come forth with any evidence that he was "not otherwise aware" of the relevant limitations periods, as required by 29 C.F.R.1614.105(a)(2). It is particularly notable that Shenkan's own affidavit, which specifically asserts that he was never notified, does not also aver that he was otherwise unaware of the relevant periods. Moreover, the record confirms that Shenkan was being represented by his brother, a licensed attorney, from at least

---

4. Shenkan's reference to equitable tolling and our decision in Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994), however, is clearly misplaced. There is no evidence that the Postal Service actively misled Shenkan or somehow extraordinarily prevented him from asserting his rights. Id. at 1387.

August of 1997, and, indeed, the District Court noted that "Shenkan was assisted by counsel, who is also his brother, throughout each application process." whether or not the Postal Service actually notified Shenkan, his attorney certainly should have been aware of the 45 day period. Cf. Bonham v. Dresser Indus., Inc., 569 F.2d 187, 193 (3d Cir. 1977) ("Failure to post the required notice will toll the running of the [limitations] period, at least until such time as the aggrieved person seeks out an attorney or acquires actual knowledge of his rights...."). And, the Supreme Court has on many occasions affirmed that a party is "deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." Irwin v. Dep't. of Veterans Affairs, 498 U.S. 89, 92 (1990) (quotations omitted); see also Seitzinger v. Reading Hosp. And Med. Ctr., 165 F. 3d 236, 241 (3d cir. 1999) ("'[T]he principles of equitable tolling....do not extend to what is best a garden variety claim of excusable neglect' by an attorney." (quoting Irwin, 498 U.S. at 96).

Finally, Shenkan argues that, to the extent he has been unable to establish a genuine issue of material fact, it is due solely to the District Court's refusal to grant his requests for additional discovery. "We apply the abuse of discretion standard when reviewing orders regarding the scope and conduct of discovery." Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1310 (3d Cir.1995). Generally we will not upset the District Court's handling of discovery absent a showing "that the district court's denial of discovery 'made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery was impossible.'" Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026, 1032 (3d Cir. 1997) (quoting In re Fine Paper Antitrust Litigation, 685 F.2d 810, 818 (3d Cir. 1982) (quotations omitted)); see also, e.g. Wisniewski v. Johns-Manville Corp., 812 F. 2d 81, 90 (3d Cir. 1987) (stating that we consider, among other facts, whether the district court's decision "deprived [the claimants] of crucial evidence, or otherwise constituted a gross abuse of discretion

resulting in fundamental unfairness"). Here, the District Court allowed Shenkan ninety days fo discovery before ruling on the Postal Service's preliminary motion, during which Shenkan submitted twenty-five interrogatories, made numerous document requests, and took an extended deposition of a senior Postal Service employee. We can find no abuse of discretion under such circumstances.

Accordingly, we will AFFIRM.

Dated

/s/ Circuit Judge Rendell

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3508

MARK D. SHENKAN

v.

JOHN E. POTTER,
POSTMASTER GENERAL

Mark Shenkan, Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 01-cv-00299)
District Judge: Honorable Donald E. Ziegler

Argued May 13, 2003
Before: RENDELL, SMITH and ALDISERT, Circuit Judges

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD,
ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO
FUENTES, SMITH, CHERTOFF, and ALDISERT*,
Circuit Judges

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

*Hon. Ruggero J. Aldisert, Senior Judge of the United States Court of Appeals for the Third Circuit; vote limited to panel rehearing only.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges of the circuit in regular active service not habing voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ Circuit Judge Rendell

Dated: August 14, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARK D. SHENKAN,	)	Civil Action No:
	)	01-299
Plaintiff,	)	
	)	
v.	)	
	)	
JOHN E. POTTER, [5]	)	
Postmaster General of the	)	
United States,	)	
	)	
Defendant.	)	

OPINION

Ziegler, Senior District Judge.

Pending before the court is the motion (doc. No. 11) of defendant, John E. Potter, Postmaster General of the united States, to dismiss, or in the alternative, for summary judgment, pursuant to Federal Rules of Civil Procedure 12(b) and 56. Plaintiff, Mark D. Shenkan ("Shenkan") commenced this action alleging one count of "discrimination

---

5. John E. Potter became the Postmaster General of the United States, effective June 4, 2001, to succeed William J. Henderson. Pursuant to Federal Rule of Civil Procedure 25(d)(1), John E. Potter is automatically substituted as the defendant in this case.

based on improper medical inquiries and examinations" and an additional count of "discrimination based on improper refusal to hire and failure to accommodate" in violation of "the Americans with Disabilities Act, 42 U.S.C. §§ 12112(d), as incorporated into the Rehabilitation Act under 29 U.S.C. §§ 791(g) and 794(b0, as well as federal regulations implementing the Rehabilitation Act set forth at 29 C.F.R § 1614.203(b), (e) and 29 C.F.R. § 1630.00 et seq." Comp. At 8,10. For the reasons that follow, the motion to dismiss, or in the alternative, for summary judgment will be granted.

I. BACKGROUND

Shenkan is an adult male who was diagnosed with bipolar disorder in 1983. In or about October of 1995, Shenkan applied for a temporary, non-union ("casual") position at the Pittsburgh General Mail facility. On or about November 24, 1995, the Postal Service informed Shenkan via letter that he had been accepted for a temporary casual position, albeit contingent upon his satisfactory completion

of a medical examination. Shenkan underwent the examination, but was subsequently informed by letter dated November 28, 1995, that the Postal Service was rescinding the offer of employment because he was found to be "not fit for duty."

Approximately two years later, on or about September 22, 1997, Shenkan applied for another temporary casual position at the New Castle, Pennsylvania facility. Shenkan alleges that, "in accordance with national standardized hiring and selection policies, practices and procedures for casual employees," he was "required to complete form(s) which elicited medical information, which included but may not have been limited to **Form 2489.**"Comp.at ¶ ¶ 9, 10 (emphasis in original). Shenkan completed Form 2489 on October 17, 1997. See Compl. At Ex. A. Thereafter, in November of 1997, Shenkan was again denied employment with the Postal Service because he was "not reliable nor dependable." See Comp. at ¶ 11. Shenkan then sent a letter dated February 9, 1998, requesting

that he be reconsidered for employment. See Comp. at ¶ 12; Pl.'s Mem. in Opp'n at Ex. 13. Shenkan alleges that to date, the Postal service has not responded to this letter. See Comp. at ¶ 12.

On March 17, 1009, Shenkan contacted Florine Williams ("Williams"), an Equal Employment Opportunity ("EEO") Counselor for mandatory counseling in accordance with 29 C. F.R. 1614.105. See Def.'s Mem. in Supp. at Ex. A. Shenkan subsequently submitted a formal complaint on or about May 7, 1998. See Pl.'s Mem. in Opp'n at Ex. 15. After receiving his right-to-sue notice, plaintiff commenced the instant action on or about February 13, 2001.

II.. STANDARD OF REVIEW

On a motion to dismiss, we must view the allegations in the complaint and all reasonable inferences therefrom as true. See Neitzke v. Williams, 490 U.S. 319, 326 (1989); Melikian v. Corradetti, 791 F.2d 274, 277 (3d Cir. 1986). We should not dismiss a complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of

his/her claim which would entitled him/her to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). The issue is whether the plaintiff should be entitled to offer evidence to support the claim, and not whether he/she will ultimately prevail. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Dismissal under Rule 12(b)(6) for failure to state a claim is therefore limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved. Ransom v. Marrazzo, 848 F.2d 398, 410 (3d Cir. 1988).

Further, we note that, generally, when ruling on a motion to dismiss, we may not consider matters extraneous to the pleadings. In re Burlington Coat Factory Sec. Litig., 114 F. 3d 1410, 1426 (3d Cir. 1997) (citing Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d. Cir. 1985)). However, an exception to this general rule provides that a "document integral to or explicitly relied upon I the complaint" may be considered "without converting the motion [to dismiss] into one for summary judgment." In re

Burlington, 114 F. 3d at 1426 (quoting Shaw v. Digital Equipment Corp., 82 F.3d 1194, 1220 (1st Cir. 1996)). Thus, in resolving the motion to dismiss, we may consider the undisputed, authentic documents to determine whether Shenkan complied with the administrative prerequisites to suit. See Pension Benefit Guar. Corp. V. White Consol. Indus. Inc., 998 F. 2d 112, 1196 (3d Cir 1993), cert. denied, 510 U. S. 1042 (1994).

III. DISCUSSION

Shenkan essentially contends that the Postal Service has a policy, pattern, and practice of discriminating against persons with disabilities, or perceived disabilities, who apply for casual, seasonal, or temporary employment, and because of such policy, pattern, and practice, he was denied employment on two occasions. In brief, Shenkan asserts that the "discriminatory scheme is executed by requiring applicants to submit to medical examinations or medical inquiries regarding disabilities before the Postal Service provides the applicant with a bonafide offer of

employment[.]" Pl.'s Mem. in Opp'n at 5.

The EEOC Regulations regarding federal section employment are provided at 29 C.F.R. Part 1614, and govern individual complaints of discrimination prohibited by the Rehabilitation Act. See 29 C.F.R. § 1614.105(a). Specifically, the Regulations state:

> [a]n aggrieved person **must** initiate contact with a [c]ounselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, **within 45 days** of the effective date of the action.

29 C.F.R. § 1614.105(a)(1) (emphasis added). However, it is further provided that:

> [t]he agency or the Commission **shall extend** the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counsel within the time limits, or for other reasons considered

> sufficient by the agency or the Commission.
> 29 C.F.R. § 1614.105(a)(2) (emphasis added).

The Postal Service argues that Shenkan has failed to comply with the administrative prerequisites to suit. Defendant indicates that , "it was not until March 17, 1998, almost three (3) years from his first denial of temporary employment and four months from his second denial of temporary employment, that plaintiff first made contact with an EEO counselor." Def.'s Mem. in Supp. at 11; see Def.'s mem in Supp. at Ex. A. Thus, defendant asserts, Shenkan has failed to timely initiate the administrative process and the complaint must be dismissed.

Shenkan rejoins that the continuing violation doctrine applies as an exception to the 45-day mandatory counseling requirement. See Pl.'s Mem. in Opp'n at 1. Shenkan argues that he has alleged a discriminatory policy, pattern, and practice, and his claims are timely so long as the alleged policy, pattern, and practice existed on January 31, 1998, 45 days prior to this contact with Williams. See id. at 2;

Compl. at ¶¶ 13, 14, 20, 21. In further support, Shenkan indicates that the EEOC Office of Appeals agreed that because he is fact alleged such a discriminatory policy, patter, and practice that is ongoing, his claim is timely. See Pl.'s Mem. in Opp'n at 19-21, Ex. 1. Thus, Shenkan relies on subpart (a) (2) of 9 C.F.R. § 1614.105, which provides that the 45-day period shall be extended "for other reasons considered sufficient by the agency or the Commission." 29 C.F.R. § 1614.105 (a) (2). Shenkan asserts that this determination is entitled to

great deference." See Pl.'s Mem. In Opp'n at 20-21.

In addition, Shenkan contends that two other exceptions provided at 29 C.F.R. § 1614.105 (a) (2) apply, namely, that he was not notified or otherwise made aware of the 45-day time limit, and, that he did not know that he was the subject of the alleged discriminatory policy until the Postal Service's failure to respond to his request for reconsideration in February of 1998. See Pl.'s Mem. in Opp'n at 19-10, Ex. 4. In short, Shenkan urges that discovery

is necessary to determine whether the alleged discriminatory policy, pattern, and practice in fact existed on January 31, 1998, 45 days prior to his contact with EEO counselor Williams. See Pl.'s Mem. in Opp'n at 3, 13-14, 28.

We turn now to analysis. "As a great rule, the statute of limitations begins to run when the plaintiff's cause of action accrues." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F. 3d 1380, 1385 (3d. Cir. 1994). "A claim accrues in a federal cause of action as soon as a potential claimant either is aware, or should be aware, of the existence of and source of an injury." Id. At 1386. This occurs when a plaintiff "knows or reasonably should know that the discriminatory act has occurred." Id. (citations omitted).

The continuing violation doctrine is an "equitable exception to the timely filing requirement." West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir. 1995). To demonstrate a continuing violation, a plaintiff must show two things: first, that **at least one act occurred within the filing period**, and two, that the defendant's conduct is **more**

than the occurrence of isolated or sporadic acts of intentional discrimination, but instead a persistent, ongoing pattern. See West, 45 F.3d at 754-55 (emphasis added); Rush v. Scott Speciality Gases, Inc., 113 F. 3d 476, 481 (3d Cir. 1997).

The Third Circuit Court of Appeals has enumerated several factors to consider in determining whether or not a continuing violation exists: the subject matter of the various incidents, the frequency at which they occur, and most importantly, their degree of permanence. See Rush, 113 F.3d at 482, citing Berry v. Board of Supervisors of Louisana State Univ, 715, F.2d 971, 981 (5th Cir. 1983); see also Cowell v. Palmer Township, 263 F. 3d 296, 292 (3d Cir. 2001) (citing West, 45 F.3d at 755 n.9). When the alleged actions are of the type that should trigger a claimant's awareness of and duty to assert his or her rights, then there is less likelihood that a continuing violation has occurred. See Rush, 113 F.3d at 482-84.

As an initial matter, we note that plaintiff cannot

satisfy the first prong of the continuing violation theory, namely, that at least one act occurred within the filing period. Indeed, plaintiff alleges that he applied for a temporary, non-union ("casual") position at the Pittsburgh General Mail facility in October of 1995, and was subsequently denied the position on or about November 28, 1995, after a physician determined that he was "not fit for duty." See Compl. at ¶¶ 6, 8. Approximately two years later, Shenkan applied a second time for a casual position at the New Castle facility, on or about September 22, 1997. See id. at ¶ 9. Shenkan alleges, "the Postal Service rejected Mr. Shenkan again, this time under the pretext that [he] was not reliable nor dependable." Compl.at ¶ 11. It is undisputed that Shenkan did not contact EEO Counselor Wiliams until March 17, 1998. See Def.'s Mem. in Supp. at Ex. A. Thus, based on plaintiff's own allegations and Williams' report, Shenkan has not shown at least one act occurring within the 45 days prior to March 17, 1998.

Moreover, applying the factors enumerated in West

and Rush to the facts of the instant case, we find that the allegations do not support a continuing violation. First, with respect to subject matter, plaintiff's initial denial of employment was based on a determination that he was "not fit for duty." See Comp. at ¶ 8. The second denial, three years later, was based on his classification as "not reliable nor dependable." See id. at ¶ 11. Thus, each decision was based on different reasons. In addition, each decision was made by two different Postal Service facilities; the first by the General Mail facility in Pittsburgh, and the second by the New Castle facility. Second, regarding frequency, plaintiff was denied employment on only two distinct occasions, which tends to show isolated decisions rather than recurring acts. Third, and most importantly, the denial of employment had a degree of permanence which should have triggered plaintiff's awareness of and duty to assert his rights. Indeed, plaintiff was required to complete the medical documentation and submit to an examination with each application, and if he believed that the Postal Service was

using the information provided to discriminate against him on the basis of his disability, the harm (denial of a job) was final and complete. Thus, the allegations are insufficient to establish a continuing violation under the factors set forth in West and Rush.

In conjunction with the second prong of the continuing violation theory (defendant's conduct is more than occurrence of isolated or sporadic acts), and the third factor mentioned above (the degree of permanence), we note tat by plaintiff's own allegations, there were two discrete employment decisions by the Postal Service that were allegedly unlawful. See Compl. at ¶¶ 8, 11. Courts have held that when the alleged discrimination is a discrete, overt act, the duty to assert one's rights is triggered, and the continuing violation theory will not apply. See, e.g., National Railroad Passenger Corp. v. Morgan, 122 S.Ct. 2061, 2073, ___U.S.___ (2002) ("[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of

discrimination.....constitutes a separate actionable 'unlawful employment practice.' ")(emphasis added); Rush, 113 F.3d at 483-84 (plaintiff's failure to promote and train claim addressed discrete instances of alleged discrimination that were not susceptible to a continuing violation analysis); Ryales v. Pilling Weck Surgical, No. CIV.A. 01-1116, 2002 WL 1364869, at *5 (E.D. pa. June 24, 2002) ("Promotion denials are discrete events with a permanent effect."); Rogan v. Giant Eagle, Inc. 113 F. Supp. 2d 777, 785 (W.D. Pa. 2000), aff'd, 276 F.3d 579 (3d Cir. 2001) (table) (dismissing failure to promote claim as time-barred, and noting that the continuing violation theory is "seldom applicable where the discriminatory act is failure to hire, promote, or train.").

Further, accepting plaintiff's allegation that the Postal Service has a policy, pattern, and practice of discriminating against the disabled, it necessarily existed at the time Shenkan applied for employment, and when he was rejected. Thus, he reasonably should have known that he was the subject of unlawful discrimination, and should have

contacted the EEO counselor to seek relief. See, e.g., Courtney v. La Salle Univ., 124 F.3d 499, 506-07 (3d Cir. 1997) (time for fling charge runs from the most recent **application** of the policy to plaintiff) (emphasis in original)[6]; Rush, 113 F.3d at 482 (citing Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1166 (7th Cir. 1996) (court expressed desire to encourage plaintiffs to commence litigation when they become aware of conduct that would support a viable claim without forcing them to do so prematurely); Moskowitz v. Trustees of Purdue Univ., 5 F.3d 279, 281-82 (7th Cir. 1993) ([i]f [plaintiff] knows or with the exercise of reasonable diligence would have known **after each act** that it was discriminatory and had harmed him, he may not sit back and accumulate all the discriminatory acts and sue on all within the statutory period applicable to the last one.") (emphasis added). Notably,

---

6. The District Court dismissed plaintiffs' allegation of a pattern and practice of discrimination, but his issue was not presented on appeal. See Courtney, 124 F.3d at 502, n.1.

"[t]he continuing violation doctrine should not provide a means for relieving plaintiffs from their duty to exercise reasonable diligence in pursuing their claims." Cowell v. Palmer Township, 263 F. 3d 286,295 (3d Cir. 2001) (citations omitted). Simply put, Shenkan cannot escape the inevitable result that he slept on his rights. [7]

We realize that the EEOC Office of Appeals determined that plaintiff's claims are timely, relying upon a footnote in Sabree v. United Brotherhood of Carpenters & Joiners Local, wherein the court noted:

> a systemic violation need not involve
> an identifiable, discrete act of discrimination
> transpiring within the limitations period.
> A systemic violation has its roots in a
> discriminatory policy or practice;
> so long as the policy or practice itself
> continues into the limitations
> period, a challenger may be deemed
> to have filed a timely complaint.
> Sabree, 921 F.2d 396, 400 n.7 (1st Cir. 1990).

We note that Shenkan must rely on the systemic violation theory because he cannot deny that there has been no discrete

---

7. We also note that Shenkan was assisted by counsel, who is also his brother, throughout each application process.

act of discrimination within 45 days prior to March 17, 1998. In any event, the Third Circuit Court of Appeals has not adopted the systemic violation theory. See Negron v. Henderson, No. Civ. A. 99-CV-4472, 2001 WL 876802, at *4 (E.D. pa. May 16, 2001) ("The Third Circuit has not explicitly adopted [the systemic violation theory] of liability advanced in this case, is a case of first impression in the Third Circuit [.]" Pl.'s Resp. at 7. As sch, we will follow the established precedent of the Third Circuit Court of Appeals concerning the continuing violation theory, as rehearsed. See West, 45 F.3d at 754-55, Rush, 113 F.3d at 482.

In sum, we find that in the instant case, there are two discrete acts of alleged unlawful discrimination, neither of which fell with the applicable time period. Namely, the failure to hire Shenkan because of his disability (in accordance with the alleged policy, pattern, and practice) on November 28, 1995 and in or about November of 1997. See Compl. at ¶¶ 8, 11. Each single act of rejecting plaintiff was actionable on its own. However, Shenkan did not contact an

EEO counselor until **three years** after the first discrete act and **four months** after the second discrete act. See Def.'s Mem. in Supp. at Ex. A. Because Shenkan failed to comply with the required time limits, and the factual allegations do not support a continuing violation, his claims are barred. The motion to dismiss will be granted. An appropriate order will follow.

Dated: August 15, 2002

/s/ Donald E. Ziegler
United States Senior Judge

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARK D. SHENKAN,	)	Civil Action No:
	)	01-299
Plaintiff,	)	
	)	
v.	)	
	)	
JOHN E. POTTER, Postmaster General of the United States,	)	
	)	
Defendant.	)	

ORDER

AND NOW, this 15th day of August, 2002, after consideration of the motion (doc. no. 11) of defendant, John E. Potter, Postmaster General of the United States, to dismiss, or in the alternative, for summary judgment, pursuant to Federal Rules of Civil Procedure 12(b) and 56, and the written submissions of the parties,

IT IS ORDERED that the motion (doc. no. 11) of defendant, John E. Potter, Postmaster General of the United States, to dismiss, or in the alternative, for summary judgment, shall be and hereby is granted.

/s/ Donald E. Ziegler
United States Senior Judge